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Supreme Court of the United States

October Term, 1979

Supreme Court No. 79-1128

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THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,

Respondents,

vs.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

—o—

BRIEF OF AMICI CURIAE IN SUPPORT OF STATE OF MONTANA

—o—

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TABLE OF CONTENTS

Pages

Questions Presented 1

Statement of Interest of Amici Curiae 2

Statement of the Case 3

Summary of Argument 3

Argument:

I. The State of Montana acquired ownership of the bed and banks of the Big Horn River within the exterior boundaries of the Crow Indian Reservation under the Equal Footing Doctrine. 5

II. The Crow Tribe does not have the power to preclude non-members from hunting and fishing on non-member lands within the reservation. 12

A. The Crow Tribe does not possess the inherent sovereign power to prohibit hunting and fishing on lands owned by non-members. 12

B. The Treaties of 1851 and 1868 do not provide the Tribe with the power necessary to make Tribal Resolution 74-05 valid. 15

1. 1851 Treaty 15

2. 1868 Treaty 16

C. 18 U. S. C. § 1165 by itself or in conjunction with the treaties does not give the Crow Tribe the power to control hunting and fishing on the lands of non-tribal members. 18

TABLE OF CONTENTS—Continued

Pages

III. Tribal Resolution 74-05 violates the equal protection and due process guarantees of the United States Constitution and the Indian Civil Rights Act. 24

A. Tribal Resolution 74-05 should be subject to the restraints of the United States Constitution. 24

B. Tribal Resolution 74-05 is subject to the restraints of the Indian Civil Rights Act. 25

Conclusion 31

TABLE OF AUTHORITIES

CASES:

Barney v. Keokuk, 94 U. S. 324 (1877) 6, 8, 9

Cherokee Nation v. Georgia, 30 U. S. (5 Pet.) 1 (1831) 13

Choctaw Nation v. Oklahoma, 397 U. S. 620 (1970) 4, 11

Crow Tribe v. United States, 284 F. 2d 361 (1960) 8, 9, 15

Crowe v. Eastern Bd. of Cherokee Indians, Inc., 506 F. 2d 1231 (4th Cir. 1974) 28

Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968) 27

Donahue v. California Justice Court, 93 Cal. App. 310 (1971) 21

Dry Creek Lodge, Inc. v. United States, 515 F. 2d 926 (10th Cir. 1975) 26

Fisher v. District Court, 424 U. S. 382, *reh. denied*, 425 U. S. 926 (1976) 15

Fletcher v. Peck, 10 U. S. (6 Cranch) 87 (1810) 13

Fort Berthold Indians v. United States, 71 Ct. Cl. 308 (1930) 8, 9

Fort Mojave Tribe v. San Bernadino County, 543 F. 2d 1253 (9th Cir.), *cert. denied*, 430 U. S. 983 (1977) 14

Graham v. Richardson, 403 U. S. 365 (1970) 29

Hennessy v. Dimmler, 394 N. Y. S. 786 (1977) 28

Hickey v. Crow Creek Hous. Auth., 379 F. Supp. 1002 (D. S. D. 1974) 27

Howlett v. Salish & Kootenai Tribes, 529 F. 2d 233 (9th Cir. 1976) 28

Hughes v. Oklahoma, 441 U. S. 322 (1979) 14

Hunter v. Erickson, 393 U. S. 385 (1969) 29

In Re Griffiths, 412 U. S. 717 (1973) 29

Johnson v. Lower Elwha Tribal Comm., 484 F. 2d 200 (9th Cir. 1973) 28

Johnson v. McIntosh, 21 U. S. (8 Wheat.) 543 (1823) 6, 13

Jones v. Brim, 165 U. S. 180 (1897) 30

Jones v. Mayer Co., 392 U. S. 409 (1968) 28

LaCoste v. Department of Cons., 263 U. S. 545 (1924) 14

Martin v. Waddell, 41 U. S. (16 Pet.) 367 (1842) 6, 9

TABLE OF AUTHORITIES—Continued

Pages

Martinez v. Santa Clara Pueblo, 540 F. 2d 1039, 1976, *rev'd on other grounds,* 436 U. S. 49 (1978) 26

Means v. Wilson, 522 F. 2d 833 (8th Cir. 1973) 28

Menominee Tribe v. United States, 391 U. S. 404 (1968) 28

Mescalero Apache Tribe v. Jones, 411 U. S. 145 (1973) 14

Moe v. Salish & Kootenai Tribes, 425 U. S. 463 (1976) 14

National Bank v. County of Yankton, 101 U. S. 133 (1886) 7

New Orleans v. Duke, 427 U. S. 297 (1976) 29

Oklahoma Tax Comm'n. v. Texas Co., 336 U. S. 342 (1949) 14

Oliphant v. Suquamash Indian Tribe, 435 U. S. 191 (1978) 13, 27

Oneida Indian Nation v. County of Oneida, 414 U. S. 661 (1974) 13

Oregon v. Corvallis Sand & Gravel Co., 429 U. S. 363 (1977) 1, 3, 6, 9

Organized Village of Kake, 369 U. S. 60 (1962) 14, 17

Pollard's Lessee v. Hagan, 44 U. S. (5 How.) 212 (1845) 6, 9

Quechan Tribe v. Rowe, 531 F. 2d 408 (9th Cir. 1976) 22, 23

TABLE OF AUTHORITIES—Continued

Pages

Reed v. Reed, 404 U. S. 71 (1971) 31

Santa Clara Pueblo v. Martinez, 436 U. S. 49 (1978) 26

Schantz v. White Lightning, 502 F. 2d 67 (8th Cir. 1974) 27

Scott v. Lattig, 227 U. S. 229 (1913) 6, 7, 9

Settler v. Yakima Tribal Court, 419 F. 2d 486, *cert. denied,* 398 U. S. 903 (1969) 25

Shelly v. Kraemer, 334 U. S. 1 (1948) 28, 29

Shively v. Bowlby, 152 U. S. 1 (1894) 6, 7, 8, 9

State v. Baker, 464 F. Supp. 1377 (W. D. Wis. 1978) 21

State v. Danielson, 427 P. 2d 689 (Mont. 1967) 21

Surplus Trading Co. v. Cook, 281 U. S. 647 (1929) 14

Talton v. Mayes, 163 U. S. 376 (1896) 24

United States v. Bouchard, 464 F. Supp. 1316 (W. D. Wis. 1978) 21

United States v. City & County of San Francisco, 310 U. S. 16 (1940) 7

United States v. Finch, 548 F. 2d 822 (9th Cir. 1976) 6, 9

United States v. Holt State Bank, 270 U. S. 49 (1925) 6, 9, 10, 11, 12

United States v. Mazurie, 419 U. S. 544 (1975) 23

TABLE OF AUTHORITIES—Continued

Pages

United States v. Montana, 457 F. Supp. 599 (D. C. Mont. 1976), *rev'd*, 604 F. 2d 1162 (9th Cir. 1979) 6, 9, 14, 25

United States v. Northern Pac. Ry. Co., 311 U. S. 317 (1940) 9

United States v. Pollman, 364 F. Supp. 995 (1973) 21

United States v. Sanford, 547 F. 2d 1085 (9th Cir. 1976) 22

United States v. Wheeler, 435 U. S. 313 (1978) 12

Weber v. Harbor Comm'rs., 85 U. S. (18 Wall.) 57 (1873) 6, 9

West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1936) ... 30

White Eagle v. One Feather, 478 F. 2d 1311 (8th Cir. 1973) 28

Worcester v. Georgia, 31 U. S. (6 Pet.) 515 (1832) 6, 13

Yellow Bird v. Oglala Sioux, 380 F. Supp. 438 (D. S. D. 1974) 28

STATUTES:

Crow Allotment Act of 1920, 41 Stat. 751 .....4, 16

Fort Laramie Treaty of 1868, 15 Stat. 649 .....16, 25

General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331, et seq. 16

Treaty of 1851, 11 Stat. 749 .....4, 15, 25

18 U. S. C. § 1151 .....19, 20, 23

TABLE OF AUTHORITIES—Continued

	Pages
18 U. S. C. § 1154 (c)	23
18 U. S. C. § 1165	5, 18, 19, 21, 22
MISCELLANEOUS:	
H. R. 625, 86th Cong., 1st Sess. (1959)	21
H. R. 7240, 85th Cong., 2d Sess. (1958)	19, 20
H. R. 2593, 85th Cong., 2d Sess. (1958)	20, 21
S. R. 1686, 86th Cong., 2d Sess. (1960)	21

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BRIEF OF AMICI CURIAE IN SUPPORT OF STATE OF MONTANA

QUESTIONS PRESENTED

I.

Does an Indian treaty, which makes no specific reference to the ownership of the beds of navigable rivers running through an Indian reservation, impliedly deprive a subsequently formed state of the ownership of the river bed to which the state would otherwise be entitled under the Equal Footing Doctrine, as reaffirmed in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977)?

II.

A. May a tribe regulate or prohibit hunting and fishing by non-members on lands within a reservation after such lands have been sold to non-members pursuant to federal law?

B. If tribal regulation of non-member hunting and fishing is authorized, must such regulation comport with

equal protection and due process guarantees as embodied in the United States Constitution and the Indian Civil Rights Act?

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STATEMENT OF INTEREST OF AMICI CURIAE

The states who join in this brief do so because they have Indian reservations within their boundaries which abut or contain navigable waters and/or they have Indian tribes residing within their boundaries that have or may attempt to regulate non-member hunting and fishing on non-member land on the reservation.

For example, in the State of Idaho there are four Indian reservations, two of which contain large amounts of land owned by non-members of the respective tribes. The Nez Perce Reservation contains approximately 756,000 acres, of which about 669,000 acres or 88.5% is owned by non-members of the tribe. The Coeur d'Alene Reservation contains approximately 345,000 acres, of which approximately 275,000 or about 80% is owned by non-members of the tribe. Almost a million acres of land lying within Idaho's Indian reservations are owned by non-Indians.

One of Idaho's most important river fisheries, the Clearwater River, runs across the northern and eastern portions of the Nez Perce Reservation. The boundaries of the Coeur d'Alene Reservation include several navigable bodies of water, such as the St. Joe River, Coeur d'Alene Lake (one of the largest natural lakes in Idaho) plus the smaller Benewah, Chatcolet, and Hidden Lakes. The

Blackfoot River forms a portion of the northeastern and northern boundaries of the Fort Hall Indian Reservation, with the Snake River forming the northwestern boundary.

For the above reasons, the ownership of the beds of navigable waters and a tribe's right to regulate non-member hunting and fishing on non-member lands within a reservation are of great interest to citizens of the amici states.

STATEMENT OF THE CASE

The facts involved are set forth in the Statement of the Case found in Montana's Petition for Certiorari, pp. 6-10.

It should be emphasized that approximately 30% of the Crow reservation lands have been sold to non-Crows, including lands abutting the Big Horn River. Thus, along various parts of the river, neither the Crows nor the United States owns the riparian land.

SUMMARY OF ARGUMENT

The first issue is whether the State of Montana under the Equal Footing Doctrine acquired ownership of the bed and banks of the Big Horn River within the Crow Indian Reservation upon its entry into the Union. A long and impressive line of authority from this Court, culminating with *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), supports the district court's decision that title to

the bed and banks of the Big Horn River is held by the State of Montana. The decision of the Ninth Circuit Court of Appeals is contrary to this line of authority and should be reversed.

The ninth circuit, in holding that title remains in the United States in trust for the Crow Tribe, relied upon this Court's decision in *Choctaw Nation v. Oklahoma,* 397 U. S. 620 (1970). The ninth circuit's reliance upon *Choctaw Nation* was misplaced. That case presented exceptional circumstances which led this Court to conclude that the United States intended to convey fee title to the bed of the Arkansas River to the Choctaws. No such exceptional circumstances exist in the present case to overcome the presumption that the United States retained ownership of the bed and banks of the Big Horn River in trust for the future State of Montana.

The second issue concerns the validity of Crow Tribal Resolution 74-05 prohibiting non-members from hunting and fishing on non-member lands within the Crow Reservation. The Crow Tribe does not possess the authority to so limit the use of non-member lands within the reservation.

Inherent sovereignty cannot be the source of such authority because a tribe's sovereign powers are limited to governing the tribe, tribal lands, and tribal members.

The Crow treaties of 1851 and 1868 as modified by the Crow Allotment Act of 1920, 41 Stat. 751, likewise grant no authority to the tribe to prohibit hunting and fishing on non-member lands within the reservation. As a result of the allotment act, ownership of one-third of the reser-

vation lands passed to non-Crows. There is nothing to indicate that Congress intended that the owners of these lands receive less than full rights of property ownership, including the right to hunt and fish in season and to grant or deny access to others.

Passage of 18 U. S. C. § 1165 did not extend tribal jurisdiction to non-member fee lands within the Crow Reservation. This statute makes it a trespass offense to go upon lands owned by Indians or held by the United States in trust for the Indians or lands reserved for use by Indians. The statute has no application to non-member fee lands within the reservation.

For the above reasons Tribal Resolution 74-05 is totally invalid and the ninth circuit decision upholding it in part should be reversed.

If this Court should find that the Crow Nation has the power to regulate the hunting and fishing activities of non-members on their own lands, such regulations must comport with rights of due process and equal protection of the law. Tribal Resolution 74-05 is patently discriminatory against non-Crows and should not be upheld by this Court.

ARGUMENT

I.

The State of Montana acquired ownership of the bed and banks of the Big Horn River within the exterior boundaries of the Crow Indian Reservation under the Equal Footing Doctrine.

At issue here is the title to the bed and banks of the Big Horn River inside the Crow Indian Reservation. The Ninth Circuit Court of Appeals says that it is held in trust by the United States for the use and benefit of the Crow Tribe of Indians. *United States v. Montana,* 604 F. 2d 1162 (9th Cir. 1979). The United States District Court for the District of Montana says it is not. *United States v. Montana,* 457 F. Supp. 599 (D. C. Mont. 1976). The district court decision is consistent with a long and impressive line of authority supporting the conclusion that under the Equal Footing Doctrine the United States held title to the beds of navigable waters in trust for the future states. *Oregon v. Corvallis Sand & Gravel Co.,* 429 U. S. 363 (1977); *United States v. Holt State Bank,* 270 U. S. 49 (1925); *Scott v. Lattig,* 227 U. S. 229 (1913); *Shively v. Bowlby,* 152 U. S. 1 (1894); *Barney v. Keokuk,* 94 U. S. 324 (1877); *Weber v. Harbor Comm'rs.,* 85 U. S. (18 Wall.) 57 (1873); *Pollard's Lessee v. Hagan,* 44 U. S. (3 How.) 212 (1845); *Martin v. Waddell,* 41 U. S. (16 Pet.) 367 (1842). These cases also support the conclusion that upon Montana's entry into the Union, title to the bed and banks of the Big Horn River vested in the new state.

The district court and the appellate court both recognized that prior to 1851, title to the Big Horn riverbed was in the United States. 457 F. Supp. at 601; *United States v. Finch,* 548 F. 2d 822, 827 (9th Cir. 1976). The ultimate fee to the Crow Indian Reservation lands was held by the United States subject to a right of occupation by the Indians. *Johnson v. McIntosh,* 21 U. S. (8 Wheat.) 543, 574 (1823); *Worcester v. Georgia,* 31 U. S. (6 Pet.) 515 (1832). Prior to Montana's entry into the Union the Congress of the United States exercised an absolute power to legislate

for the territories within which the Crow lands were located. *National Bank v. County of Yankton,* 101 U. S. 133 (1886); *United States v. City & County of San Francisco,* 310 U. S. 16 (1940). During the territorial period, Congress was capable of conveying public lands, including the beds and banks of navigable waters. However, such was not the practice:

> The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

Shively v. Bowlby, 152 U. S. 1, 58 (1894).

The position of the United States with respect to state ownership of the beds and banks of navigable waters was described by this Court in a straightforward manner in *Scott v. Lattig,* 227 U. S. 229 (1913):

> Coming to the effect to be given to the admission of Idaho as a state and to the disposal of the fractional subdivisions on the east bank, it is well to repeat that the Snake river is a navigable stream, for there is an important difference between navigable and non-navigable waters in such a connection. Thus, Rev. Stat., § 2476, U. S. Comp. Stat. 1901, p. 1567, which is but a continuation of early statutes on the subject (Acts May 18, 1796, 1 Stat. at L. 464, Chap. 29, § 9, U. S. Comp. Stat. 1901, p. 1567; March 3, 1803, 2 Stat. at L.

> 229, Chap. 27, § 17), declares: "All navigable rivers within the territory occupied by the public lands shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both;" and of this provision it was said in *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 288, "the court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty, and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. *St. Clair County v. Lovingston*, 23 Wall. 46, 68; *Barney v. Keokuk*, 94 U. S. 324, 338; *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387, 434-437; *Shively v. Bowlby*, 152 U. S. 1, 48-50, 58; *McGilvra v. Ross*, 215 U. S. 70.

227 U. S. at 242-243.

The 1851 Fort Laramie Treaty recognized Crow Indian claims to the lands described therein, *Crow Tribe of Indians v. United States*, 284 F. 2d 361, 371 (1960); *Fort*

Berthold Indians v. United States, 71 Ct. Cl. 308, 332 (1930), but did not create a reservation for the Indians. *Crow Tribe* at 370; *United States v. Northern Pac. Ry. Co.,* 311 U. S. 317, 349 (1940). The Crow Reservation was established by the 1868 Fort Laramie Treaty, 15 Stat. 649. A significant portion of the Big Horn River lies within the present boundaries of that reservation. *United States v. Montana,* 604 F. 2d at 1164. It is undisputed that the Big Horn is a navigable stream.

The issue is whether the United States transferred beneficial ownership of the bed to the Crow Tribe by the treaties of 1851 and 1868, or whether it retained ownership of the bed and banks as public lands, which passed to the State of Montana upon its admission to the Union. *United States v. Finch,* 548 F. 2d 822, 827 (1976).

It has been repeatedly held that title to the beds and banks of all navigable waters within the territories of the United States are held in trust to be turned over to the respective states upon their admission to the Union. *Oregon v. Corvallis Sand & Gravel Co.,* 429 U. S. 363 (1977); *United States v. Holt State Bank,* 270 U. S. 49 (1925); *Scott v. Lattig,* 227 U. S. 229 (1913); *Shively v. Bowlby,* 152 U. S. 1 (1894); *Barney v. Keokuk,* 94 U. S. 324 (1877); *Weber v. Harbor Comm'rs.,* 85 U. S. (18 Wall.) 57 (1873); *Pollard's Lessee v. Hagan,* 44 U. S. (3 How.) 212 (1845); *Martin v. Waddell,* 41 U. S. (16 Pet.) 367 (1842). Nowhere does one find a general exception to this principle for Indian reservations, even though the public lands of the west contained numerous Indian reservations, many of which embraced or bordered upon navigable waters. Had there ever been an intention on the part of the United

States to make such an exception, surely that intent would have been clearly expressed at some point in our nation's history. The court below has cited no such authority, nor does any such authority appear to exist.

This Court, in the case of *United States v. Holt State Bank*, 270 U. S. 49 (1926), considered whether the State of Minnesota, upon admission to the Union in 1858, acquired ownership of the bed of a navigable lake located within an Indian reservation. The opinion states:

> [T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances, when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

270 U. S. at 55.

The Court in *Holt State Bank* reviewed the Treaties of 1854, 10 Stat. 1109, and 1855, 10 Stat. 1165, under which the Red Lake Indian Reservation came to be known and recognized as a reservation for the Chippewa Indians. The Court concluded:

> There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in ac-

> customed ways; but these were common rights vouchsafed to all, whether white or Indian. . . .

270 U. S. at 58-59.

The case of *Choctaw Nation v. Oklahoma,* 397 U. S. 620 (1970) presented an issue similar to that in *Holt State Bank.* This Court held in *Choctaw Nation* that the Choctaw and Cherokee tribes had been granted title to lands beneath the navigable waters of the Arkansas River. *Choctaw Nation* at 634. The facts in *Choctaw Nation,* however, presented *exceptional circumstances. Choctaw Nation* at 639 (concurring opinion). The facts were that:

> [T]he United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it." In addition, the United States pledged itself to secure to the Choctaws the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334.

397 U. S. at 625.

The exceptional circumstances present in *Choctaw Nation* overcame the presumption that the United States retained ownership of the river bed in trust for the future state. 397 U. S. at 635.

The facts in the present case do not approach the exceptional circumstances in *Choctaw Nation.* There is nothing in the 1868 treaty which approaches a grant of land underlying the Big Horn River; nor is there anything

evincing a purpose to depart from the established policy of treating such lands as held for the benefit of the future state. *See Holt State Bank,* 270 U. S. at 58-59. The district court was correct in its holding that the bed and banks of the Big Horn River are owned by the State of Montana.

II.

The Crow Tribe does not have the power to preclude non-members from hunting and fishing on non-member lands within the Reservation.

A. The Crow Tribe does not possess the inherent sovereign power to prohibit hunting and fishing on lands owned by non-members.

The inherent sovereignty possessed by The Crow tribe is over the tribe and its members and does not extend to non-members.

This Court in *United States v. Wheeler,* 435 U. S. 313, 323 (1978) said:

> Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.
>
> * * *
>
> In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. [Citation omitted.]

Tribes have been implicitly divested of sovereignty in several instances involving relations between an Indian tribe and non-members. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978); *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1923); *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810).

In *Oliphant* this Court held that the tribe did not have criminal jurisdiction over non-Indians. "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status,'" 435 U.S. at 210. This Court then cited with approval Justice Johnson's opinion in *Fletcher v. Peck,* 6 Cranch at 147 that Indian sovereignty is limited to governing themselves and does not extend to non-members.

The fact that the state and not the tribe possesses sovereign power over non-Indians and their lands within the state's borders is indicated by this Court's statement in *Oliphant,* 435 U.S. at 212:

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these." *United States v. Kagama,* 118 U.S. 375, 379 (1886).

Indian reservations are part of the state within which they are located. The state's law, both civil and criminal, have the same force and effect on Indian reservations as elsewhere within the state, except these laws have limited application to Indians. *Surplus Trading Co. v. Cook,* 281 U. S. 647 (1929). In *Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 148 (1973) this Court said:

> The upshot has been the repeated statements of this Court to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *Organized Village of Kake, supra,* at 75, 7 L. Ed. 2d 573; *Williams v. Lee,* 358 U. S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959); *New York ex rel. Ray v. Martin,* 326 U. S. 496, 499, 90 L. Ed. 261, 66 S. Ct. 307 (1946); *Draper v. United States,* 164 U. S. 240, 41 L. Ed. 419, 17 S. Ct. 107 (1896).

See Moe v. Salish & Kootenai Tribes, 425 U. S. 463 (1976); *Fort Mojave Tribe v. San Bernadino County,* 543 F. 2d 1253 (9th Cir.), *cert. denied,* 430 U. S. 983 (1977); *Oklahoma Tax Comm'n. v. Texas Co.,* 336 U. S. 342 (1949).

The state has historically had the police power to regulate hunting season's harvest regulations and to determine whether or not hunting is allowed in specific sections of the state. *Hughes v. Oklahoma,* 441 U. S. 322 (1979); *LaCoste v. Department of Cons.,* 263 U. S. 545 (1924). In the case at bar, Montana has been exercising jurisdiction over hunting and fishing on non-Indian lands within the reservation. *United States v. Montana,* 457 F. Supp. 599, 610 (D.C. Mont. 1976), *rev'd,* 604 F. 2d 1162 (9th Cir. 1979). If a portion of a state is open to hunting and fishing the state cannot prohibit citizens of the state or of another

state from hunting or fishing if they meet the licensing requirements. The right to determine who may hunt on a particular parcel during the open season belongs to the landowner or lessee. These rights do not interfere with tribal self-government. To hold otherwise is to give the tribe a greater sovereign power than that possessed by the state. The district court was correct when it held that: "The tribe cannot preempt a power which rests with the state government simply by enacting an ordinance inconsistent with the power and authority of the state, and consistent with tribal self-government, absent the authority of Congress." 457 F. Supp. at 610. *See Fisher v. District Court,* 424 U. S. 382, *reh. denied,* 425 U. S. 926 (1976).

B. The Treaties of 1851 and 1868 do not provide the tribe with the power necessary to make Tribal Resolution 74-05 valid.

1. 1851 Treaty

The purposes of the 1851 Treaty were to gain safe passage across the lands of the various Indian tribes; recompense the Indians for the loss of buffalo, other game animals, timber and forage; delineate tribal boundaries, promote peace between the various tribes, and identify the Indians who committed depredations against whites. The treaty did not create a reservation. *Crow Tribe v. United States,* 284 F. 2d 361, 364, 366, 368 (1970). The only reference to hunting and fishing in the treaty is contained in Article 5. It provides that the eight tribes signing the treaty "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 11 Stat. 749. This wording is certainly

not an express grant of authority to the tribe to regulate hunting and fishing on non-member lands, nor can one be implied. The appellate court recognized that whites and other Indian tribes undoubtedly hunted and fished within the treaty designated territory and that the Crows hunted outside of their treaty designated territory. 604 F. 2d at 1167. Thus, the tribe did not obtain exclusive hunting and fishing rights under the 1851 Treaty.

2. 1868 Treaty

The appellate court correctly held that the purpose of the 1868 Fort Laramie Treaty, 15 Stat. 649, was to reduce the size of the Crow territory designated by the 1851 Treaty. 604 F. 2d at 1166, 1167.

Article 2 of the treaty created a reservation for the Crows and provided that it, ". . . is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; . . ." It is clear that the Indians' right to the absolute and undisturbed use and occupation of the lands was altered by the passage of the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. Congress obviously realized that the provisions for sale of alloted lands would lead to their purchase and occupation by non-members of the Crow tribe. This is exactly what happened. Approximately 690,000 acres, or about one-third of the lands within the reservation, are now owned by non-Crows.

The Ninth Circuit Court of Appeals, in discussing the Allotment Acts, said:

> While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts.

604 F. 2d at 1168.

Landowners have always possessed the right not only to hunt on their own lands but also to grant or deny access to others. These rights are not limited to the land on which they reside, but extend to all of the lands they own. There is nothing in the record that indicates that Congress intended that purchasers under these Acts were to receive less than the full rights of property ownership.

Furthermore, Congress wanted a peaceful assimilation to result from the Allotment Acts. *Organized Village of Kake,* 369 U. S. 60, 72 (1962). This would certainly not be the case if the Crow tribe can exclude non-member non-residents from hunting or fishing on the non-members' own lands. Congress was also aware that non-tribal members could obtain more than one parcel of land. They surely did not intend that an owner could hunt only on the parcel where he resided but be prohibited from hunting on the second parcel where he did not reside. Yet, this is precisely what the Ninth Circuit Court of Appeals held. 604 F. 2d at 1169.

Article 4 contains the only other reference to Indian

hunting and fishing rights in the 1868 Treaty. It provides that:

> [The Indians] will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

This provision reserved for the Indians "off reservation" hunting and fishing rights on the lands acquired from the Crows by the United States. The right reserved was qualified in that the lands must be unoccupied, owned by the United States, game must be present, and peace exist. Article 4 does not refer to "on reservation" hunting and fishing. It was not necessary for the Indians to reserve the right to hunt or fish on the reservation but it was necessary to reserve this right on the lands they ceded to the United States which were outside of the reservation. It is respectfully submitted that the 1868 Treaty does not contain an express grant of authority which would allow the Crow tribe to prohibit non-tribal members from hunting or fishing on their own lands.

C. 18 U.S.C. § 1165 by itself or in conjunction with the Treaties does not give the Crow Tribe the power to control hunting and fishing on the lands of non-tribal members.

18 U.S.C. § 1165 does not and never was intended to extend tribal jurisdiction to fee lands owned by non-tribal members within the boundaries of the Crow Reservation. 18 U.S.C. § 1165, Hunting, trapping, or fishing on Indian land, says:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom shall be fined. . . .

The statute is limited to lands owned by Indians and lands held by the United States in trust for the Indians or lands reserved for use by Indians. If Congress had intended to extend jurisdiction to non-Indian lands they could easily have done so by incorporating into § 1165 the definition of Indian country: "all land within the limits of any Indian reservation under the jurisdiction of the United States government notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U. S. C. § 1151. The original bill (H. R. 7240), predecessor to 18 U. S. C. § 1165, read in part:

> . . . or upon any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under authority of the United States, or any Indian allotment, while title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the tribe or the allottee without the consent of the United States, for the purpose of hunting, trapping, or fishing, or for the removal of game, peltries, or fish.

Cong. Rec., H. R. 7240, 85th Cong. 2d Sess., Vol. 104, p. 18317. An amendment was proposed in the subcommittee of the House Committee on the Judiciary that read in part:

> "Whoever, without lawful authority or permission, goes upon *Indian country as defined in Sec.* 1151 of

> this title, for the purpose of hunting, trapping, or fishing, or for the removal of game peltries, or fish. . . ." (Emphasis added.)

The Department of Interior recommended in a letter dated May 23, 1958, against the use of the phrase "Indian Country" as defined in 18 U. S. C. § 1151. The department believed such language would result in a contention that the law was intended to apply to non-Indian land within a reservation. They pointed out that a previous report (House Report 2593, 85th Congress, 2d Session) had been worded so as to avoid any argument that the bill would apply to non-Indian land. Appendix J to Montana's Pet. for Cert., p. 123.

House Report 2593 states the purpose of H. R. 7240 is to make it unlawful to go upon Indian land to hunt, trap, or fish without the consent of the individual Indian or tribe. The House Report in its statement of the problem said:

> Indian property owners should have the same protection as other property owners, for example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. This is for the reason that Indian tribal law is enforceable against Indians only; not against non-Indians.
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> • • •
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> Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers.

H. R. 2593, 85th Cong., 2d Sess.

Subsequent House Report 625, 86th Congress, 1st Session, and Senate Report 1686, 86th Congress, 2d Session, are very similar and again refer to "Indian lands" and "Indian property owners" and not to "Indian country." In *Oliphant,* this Court in referring to S. Rep. 1686, 86th Cong., 2nd Sess. 2-3 (1960), said: "The legislation (28 U. S. C. § 1165) will give to the Indian tribes and to *individual Indian owners* certain rights that now exist as to others, and fills a gap in the present law for the protection of *their property.*" 435 U. S. at 206. (Emphasis added.)

Prior to the ninth circuit decision, several other courts interpreted § 1165 to be confined to lands which are owned by Indians or held in trust for their benefit. *State v. Baker,* 464 F. Supp. 1377 (W. D. Wis. 1978); *United States v. Bouchard,* 464 F. Supp. 1316 (W. D. Wis. 1978); *United States v. Pollman,* 364 F. Supp. 995 (1973); *Donahue v. California Justice Court,* 93 Cal. App. 310 (1971).

The question of whether § 1165 preempts state regulation of fishing and hunting by a non-Indian within a reservation was addressed in *State v. Danielson,* 427 P. 2d 689 (Mont. 1967). There, the non-Indian defendant claimed that the state did not have jurisdiction to try him for killing elk out of season on the Crow reservation. The Montana Supreme Court in holding that the state had jurisdiction to enforce its fish and game regulations against nonmembers of the Crow tribe said:

> It is significant to note that section 1165 does not directly prohibit hunting and fishing but makes the act of going upon the Indian reservation a violation if

> done for the purpose of hunting or fishing. Section 1165 expressly permits hunting and fishing on Indian reservations without additional federal regulation if proper permission or authorization is given for the entry. Therefore, section 1165 must be considered to be a statute providing a penalty for trespass to an Indian reservation and not an attempt by Congress to enter the field of fish and game regulation.

427 P. 2d at 691.

In a subsequent case, *United States v. Sanford,* 547 F. 2d 1085 (9th Cir. 1976), the court held that § 1165 was designed to prevent encroachments on *Indian lands* and rejected the argument of the United States that § 1165 makes illegal the unauthorized killing of wildlife on an Indian reservation. The *Sanford* court said:

> Section 1165 does not represent an attempt by the federal government to enter the arena of fish and game regulation on Indian reservations; thus, the federal statute cannot be viewed as a prohibiting or conflicting act. Further, we are convinced that the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations.

547 F. 2d at 1089.

Based on the wording of 18 U. S. C. § 1165, its legislative history, and pertinent case law, it is clear that the statute was designed only to protect against trespass on Indian lands. It clearly was not an attempt on the part of Congress to give the tribe power to regulate hunting and fishing on lands owned by non-members.

In *Quechan Tribe v. Rowe,* 531 F. 2d 408 (9th Cir. 1976), the court held that the tribe had authority to regulate entry upon the reservation for hunting or fishing pur-

poses. The *Quechan* case is clearly distinguishable from the instant case since at the time the events occurred (1971) all the land on the reservation was held in trust for the tribe. Therefore, *Quechan* clearly does not stand for the proposition that an Indian tribe can prohibit non-members from entering, hunting, trapping or fishing upon the lands of non-members.

United States v. Mazurie, 419 U. S. 544 (1975) is often cited for the proposition that an Indian tribe can regulate non-member activities on non-member lands within a reservation. The *Mazurie* case is distinguishable because it dealt with an express Congressional delegation of authority to tribes for the regulation of the distribution of alcoholic beverages within reservations. Even this express delegation was limited. It did not extend to fee patented lands within non-Indian communities nor to rights-of-way through reservations. 18 U. S. C. § 1154 (c). Also, tribal ordinances could not authorize a violation of state laws. 18 U. S. C. § 1161. 419 U. S. at 547. In the case at issue, there is no delegation by Congress to the Crow tribe of any power to prohibit hunting and fishing by non-members on lands owned by non-members within the reservation.

In order for Tribal Resolution 74-05 to be valid, it must be promulgated pursuant to a power possessed by the tribe. It is respectfully submitted that the tribe does not have inherent sovereign power over non-members or their lands, nor did the Crow tribe receive such power from the relevant treaties or statutes. Therefore, Tribal Resolution 74-05 is totally invalid and the ninth circuit's ruling upholding it in part should be reversed by this Court.

III.

Tribal Resolution 74-05 violates the equal protection and due process guarantees of the United States Constitution and the Indian Civil Rights Act.

A. Tribal Resolution 74-05 should be subject to the restraints of the United States Constitution.

If this Court should find that the Crow Nation has the power to regulate the hunting and fishing activities of non-members on their own lands, such regulations should not be allowed to violate individual rights of due process and equal protection of the law as guaranteed by the United States Constitution.

It is recognized that, as a general rule, the United States Constitution does not bind Indian tribes in regard to their internal affairs. This Court held in *Talton v. Mayes,* 163 U. S. 376, 384 (1896) that the fifth amendment did not "operat[e] upon . . . the powers of local self-government enjoyed by the [Indian] tribes." In explaining this conclusion, the Court stated, "[A]s the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which as we have said, has for its sole object to control the powers conferred by the Constitution on the national government."

The instant case presents a fact situation quite different from that of the *Talton* case. The ninth circuit based its decision upholding Tribal Resolution 74-05, as

modified, upon powers allegedly conferred on the Crow Nation by the Treaties of 1851 and 1868, as augmented by 18 U. S. C. § 1165. *United States v. Montana,* 604 F. 2d 1162, 1167 (9th Cir. 1979). These sources of tribal power did not "exist prior to the Constitution" but came long after Constitutional guarantees against arbitrary government action were firmly established. Nor does the resolution merely involve internal tribal affairs but permits the Crow Nation to regulate activities of non-members on their own lands.

Surely any power of an Indian tribe to regulate non-members, where the source of that power is the United States government through treaty provisions and/or federal statute, must be subject to the fundamental restraints of the Constitution. To hold otherwise would be to allow Congress to give to an Indian tribe the right to rule members and non-members arbitrarily—a right which Congress itself does not have. This conclusion is supported by another ninth circuit decision. *Settler v. Yakima Tribal Court,* 419 F. 2d 486, 489, *cert. denied,* 398 U. S. 903 (1969) wherein it was said:

> [A]lthough the Fourteenth Amendment may not apply to tribal courts, there must be and is a limit to the "exclusive" authority of the Yakima Nation to regulate Indian fishing when that regulation becomes so summary and arbitrary as to shock the conscience of the federal court, or goes beyond the scope of authority originally contemplated by the Treaty of 1859.

B. Tribal Resolution 74-05 is subject to the restraints of the Indian Civil Rights Act.

In the years following the *Talton* decision, concern developed over the lack of constitutional rights of individual

Indians *vis-a-vis* their tribal governments. In response to these concerns, Congress passed the Indian Civil Rights Act, 25 U. S. C. §§ 1301-1303 in 1968. In the case of *Santa Clara Pueblo v. Martinez,* 436 U. S. 49 (1978) this Court held that the Act did not authorize civil actions for injunctive or other relief to redress violations other than through the making of a writ of habeas corpus by a person detained by an Indian tribe. The *Santa Clara* holding does not bar the Court from addressing the due process and equal protection issues in this case, however, since all parties have asked the Court for a declaratory ruling on the legality of Tribal Resolution 74-05.

The legislative history of the Act suggests that Congress considered, and rejected, the opportunity to extend the full panoply of Constitutional restraints and requirements to tribal governments. Congress chose instead to retain those rights which it considered essential and to omit those rights which may have conflicted with traditional Indian cultures. *Martinez v. Santa Clara Pueblo,* 540 F. 2d 1039, 1044 (1976), *rev'd. on other grounds,* 436 U. S. 49 (1978).

Two rights which were explicitly retained in the Act are those of due process and equal protection of the laws. Section 1302 (8) of the Indian Civil Rights Act states: "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protecton of its laws or deprive any person of liberty or property without due process of law."

In the case of *Dry Creek Lodge, Inc. v. United States,* 515 F. 2d 926, 934 (10th Cir. 1975), the court held that this

section protected non-Indians as well as Indians, saying, "[i]t is indeed difficult to reach any other conclusion since by its terms it extends to all persons." *See, Schantz v. White Lightning,* 502 F. 2d 67, 70 n. 5 (8th Cir. 1974); *Hickey v. Crow Creek Hous. Auth.,* 379 F. Supp. 1002 (D. S. D. 1974); and *Dodge v. Nakai,* 298 F. Supp. 17 (D. Ariz. 1968). That position was also shared by Mr. Justice Rehnquist in his opinion in *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191, 195 (1978), where he observed:

> The Indian Civil Rights Act merely extends to "any person" within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution . . . an early version of the Indian Civil Rights Act extended its guarantees only to "American Indians," rather than to "any person." The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indian or non-Indians." [Citation omitted.] . . . [T]he modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or act of Congress.

Thus, if it is found that the Crow Nation has the right by "either treaty provision or Act of Congress" to enforce its laws against non-Crow residents and land owners, such laws must be subject to the Indian Civil Rights Act.

It is respectfully urged that Crow Tribal Resolution 74-05 violates both the equal protection and due process clauses of the Indian Civil Rights Act, and thus cannot be allowed to stand, even as amended by the ninth circuit. 604 F. 2d at 1169. In appropriate circumstances courts have given due regard to the cultural and ethnical background

of the Indian tribes in litigation under the Act. *White Eagle v. One Feather,* 478 F. 2d 1311 (8th Cir. 1973); *Yellow Bird v. Oglala Sioux,* 380 F. Supp. 438 (D. S. D. 1974). In *Howlett v. Salish & Kootenai Tribes,* 529 F. 2d 233, 238 (9th Cir. 1976) the court, in articulating an approach designed to maintain cultural tribal identity and yet preserve fundamental constitutional rights, stated:

> Where the strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom firmly embedded in Indian culture, and where the individual injury alleged by the tribal member is, by comparison, not a grievous one, then the equal protection clause at 25 U. S. C. § 1302 (8) may be implemented somewhat differently than its constitutional counterpart.

It follows that where those special circumstances stated are not applicable, due process and equal protection rights, as interpreted under the Constitution, are embraced by the Indian Civil Rights Act. 540 F. 2d at 1045; 529 F. 2d 233 at 238; *Means v. Wilson,* 522 F. 2d 833 (8th Cir. 1973); *Crowe v. Eastern Bd. of Cherokee Indians, Inc.,* 506 F. 2d 1231 (4th Cir. 1974); *Johnson v. Lower Elwha Tribal Comm'n.,* 484 F. 2d 200 (9th Cir. 1973); 478 F. 2d at 1314; and *Hennessy v. Dimmler,* 394 N. Y. S. 786 (1977).

In the instant case, both the United States and the Crow Nation have stated that the right to hunt and fish within the confines of the reservation is a property right. This position is consistent with the holding of this Court in *Menominee Tribe v. United States,* 391 U. S. 404 at 413 (1968). This Court has also stated that the acquisition, enjoyment, and alienation of property are basic civil rights. *Jones v. Mayer Co.,* 392 U. S. 409, 432 (1968). In *Shelly*

v. Kraemer, 334 U. S. 1, 10 (1948) it was observed: "Equality in the enjoyment of property rights was regarded by the framers of that [14th] Amendment as an essential precondition to the realization of other basic civil rights and liberties. . . ."

It cannot be denied that Tribal Resolution 74-05 purports to take away the right of non-members to hunt and fish on their own property while members are not so proscribed. Therefore, the distinction drawn by the Crows is clearly between members and non-members of the Crow Nation. For the purposes of equal protection and due process analysis, the exact nature of this distinction is unclear. It is obviously a distinction based on an immutable characteristic; that is, whether one is or is not a Crow Indian. Therefore, it is most logically seen as a distinction based on race or national origin. Laws which discriminate on the basis of national origin or race receive strict scrutiny under the equal protection clause. *New Orleans v. Duke,* 427 U. S. 297 (1976); *Graham v. Richardson,* 403 U. S. 365 (1970); *Hunter v. Erickson,* 393 U. S. 385 (1969). This means that:

> In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.

In Re Griffiths, 413 U. S. 717, 721-722 (1973).

Neither the tribe nor the United States has suggested any compelling reason, or even a rational basis, why non-members should be prohibited from hunting on their own

land while members are presumably free to hunt on any land within the reservation—including that owned by the non-members! The goal purportedly is one of game conservation, certainly a legitimate tribal (and state) interest. But, in order to achieve that goal, no legitimate reason for making such a blatant distinction between the rights of Crows and non-Crows has been offered.

Due process analysis leads to the same conclusion. The case of *Jones v. Brim,* 165 U. S. 180, 182 (1897) held that the doctrine of substantive due process is meant to protect citizens from any arbitrary deprivation of rights, whether relating to one's life, liberty, or property. Due process demands that a law not be unreasonable, arbitrary, or capricious, and that the means selected has a real and substantial relation to a permissible legislative objective sought to be attained. *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 398 (1936).

The constitutional infirmity is not cured by the ninth circuit's modification whereby non-members would be allowed to hunt and fish on lands on which they actually reside. The distinction still lies between the Crows and non-Crows, because whether non-resident landowners would be allowed to hunt or fish on their own land would depend entirely upon whether or not such landowners were members of the Crow nation. Again, no sound basis for that distinction has been offered.

The ninth circuit's suggestion that "those who 'live on the land' in the West are likely to regard hunting and fishing thereon to be as natural and ordinary as working, sleeping, and eating" while "those who do not 'live on the

land' are somewhat less inclined" has no basis in either law or fact. 604 F. 2d at 1169. The right to use one's property has its legal foundation on the basis of ownership, not residency. Furthermore, many individuals purchase land in the west specifically for outdoor recreational purposes. All landowners, whether resident or not, regard the right to hunt and fish on their own land to be a property right to which they are entitled. The distinction between resident and non-resident non-members drawn by the ninth circuit can most accurately be seen as one of administrative convenience. Admittedly, it would be more difficult to enforce the proscription against residents than non-residents. This Court, however, has emphatically rejected administrative convenience as a rationale for discriminatory legislation. *See, Reed v. Reed,* 404 U. S. 71 (1971).

Finally, it should be noted that the ninth circuit cautioned Montana that it must not fashion its regulations so as "to discriminate against the Crow Tribe rather than to conserve the game and fish." 604 F. 2d at 1172. Surely non-discrimination must work both ways. Tribal Resolution 74-05 is patently discriminatory against non-Crows, and as such, it should not be upheld by this Court. Consequently, the ninth circuit decision must be reversed.

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CONCLUSION

Under the Equal Footing Doctrine the beds and banks of navigable waters were held by the United States in trust for future states, save in exceptional circumstances where a contrary intention was clearly evidenced. A re-

view of the treaties and circumstances surrounding the establishment of the Crow Indian Reservation does not reveal any intention to deny the future State of Montana such ownership.

The Crow Indian Tribe has sought, through passage of a tribal resolution, to deny non-members the right to hunt and fish on lands owned by non-members within the reservation. The hunting and fishing prohibition applies only to non-members. The Crow tribal resolution is invalid because: (1) the tribe lacks inherent sovereignty over non-members and their lands; (2) the tribe did not obtain such power through treaties; and (3) the tribe did not obtain such power through statute. Further, Tribal Resolution 74-05, even as modified by the ninth circuit, is blatantly discriminatory against non-members.

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